RECORD AND BRIEFS

FILED
FEB - 6 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND LLC

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF NEITHER PARTY

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February 6, 2017

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QUESTION PRESENTED

Whether the patent venue statute, 28 U.S.C. § 1400(b), is the sole venue provision for patent cases and does not take into consideration the definition of "reside" set forth in the general venue statute, 28 U.S.C. § 1391(c), and the specifically applicable phrases "For all venue purposes," and "except as otherwise provided by law."

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INTEREST OF AMICUS CURIAE

The American Intellectual Property Law Association ("AIPLA") is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private and corporate practice, in government service, and in the academic community. AIPLA's members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's inter-est in healthy competition, reasonable costs, and basic fairness.[1]

AIPLA has no stake in the parties to this litigation or in the result of this case, other than its interest in

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[1] In accordance with Supreme Court Rule 37.6, AIPLA states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than AIPLA and its counsel. Specifically, after reasonable investigation, AIPLA believes that (i) no member of its Board or Amicus Committee who voted to file this brief, or any attorney in the law firm or corporation of such a member, represents a party to the litigation in this matter, (ii) no representative of any party to this litigation participated in the authorship of this brief, and (iii) no one other than AIPLA, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

the correct and consistent interpretation of the laws affecting intellectual property.[2]

SUMMARY OF ARGUMENT

With the 1988 Amendments to Chapter 87 of Title 28, Congress sought to harmonize the meaning of corporate "resident" in the various venue statutes. The number of corporate actions had increased across different venues, and the harmonization was intended to bring corporate patent venue in line generally with other corporate venue requirements. Indeed, the patent venue statute was seen as lagging behind other venue statutes. In 1988, Congress changed the general venue statute at 28 U.S.C. § 1391(c) from a substantive provision to a definitional section defining corporate "Residency" and explicitly done "[f]or the purposes of venue ***under this chapter***." 28 U.S.C. §1391(c) (emphasis added).

Two years later, the Federal Circuit properly interpreted the venue provisions of the 1988 Amendments to construe "resides" in the patent venue statute, 28 U.S.C. § 1400(b), consistently with the rest of the venue provisions. *VE Holdings Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). The Federal Circuit held that the phrase "[f]or purposes of venue under this chapter" in section 1391(c) required application of that statute to the patent venue statute at section 1400 because it was found in

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[2] Pursuant to Supreme Court Rule 37.3(a), AIPLA has obtained the consent of the parties to file this amicus brief. Petitioner has given a blanket consent in a letter filed with the Court, and Respondent has consented in an email addressed directly to AIPLA.

the same chapter. That decision, which is the authority for the decision on review, gave the correct interpretation of the venue provisions.

The Federal Circuit's decision in this case considered 2011 amendments to section 1391 that deleted the phrase "[f]or purposes of venue under this chapter," added the phrase "[f]or all venue purposes," and added the phrase "[e]xcept as otherwise provided by law." It rejected the argument that that these amendments returned the law to the rule under *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), that section 1400 is not supplemented by section 1391. This Court should affirm the decision below and confirm that the *VE Holdings* decision provided the correct interpretation of the venue provisions.

Cloaked in a strained argument about venue, Petitioner's concerns about forum shopping are the result of a perfect storm: changes in the law, court procedures, and market behavior. This complaint is no basis to reverse Federal Circuit precedent grounded in the statute and well-settled in practice. Increased forum-shopping in patent cases is the result of unanticipated changes in the federal court system, which created plaintiff opportunities in district courts that were perceived as "patent friendly." Many district courts promulgated local patent rules that favored the types of litigants they wanted to attract. Additionally, in 2011, the President signed the Patent Pilot Program, providing training in patent litigation for the judges of participating districts.[3] In this context, a

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[3] Pub. L. No. 111-349, 124 Stat. 3674 (2011) (codified at 28 U.S.C. § 137 note (2012)).

non-practicing entity business model developed that resulted in a rise in litigation that was driven by forum shopping.

AIPLA agrees with Petitioner that forum shopping in patent litigation should be minimized; however, a return to the patent venue doctrine under *Fourco* is not the answer. Patent law has benefitted from decisions across the breadth of the federal judiciary. A return to the *Fourco* rule could have significant unintended consequences: further consolidation of patent cases in the preferred patent districts (*i.e.*, those where certain types of companies generally are found). Examples could include New Jersey for pharmaceutical cases, the Northern District of California for technology cases, and Delaware, the most common state of incorporation, for patents cases generally.

Any patent venue reform must be more nuanced than the binary question presented by Petitioner. Reform must take into consideration the different landscape for patent infringement litigation today, take advantage of the development of patent law over the past three decades, and provide appropriate compromises to continue such development. Some in Congress have recognized that reform of the patent venue statute may be needed, and introduced bills in both the House and the Senate during the prior congressional term. Statutory amendments would allow Congress to strike a delicate balance in the interests of patent owners and accused infringers. By contrast, the solution which Petitioner has offered to this Court is necessarily a blunt instrument.

For these reasons, AIPLA urges this Court to affirm the Federal Circuit's decision below and avoid

engaging in policy-making through a strained interpretation of the current law.

ARGUMENT

I. CONGRESS INTENDED TO HARMONIZE THE MEANING OF "RESIDENT" IN THE GENERAL VENUE STATUTE AND THE PATENT VENUE STATUTE

The Federal Circuit's decisions in both *VE Holding* and the decision below are correct interpretations of the patent venue statute. As stated in those decisions, the definition of "Residency" found in the general venue statute, 28 U.S.C. § 1391(c), "applie[s] to 'resides' in patent venue statute, 28 U.S.C. § 1400(b)." *VE Holding*, 917 F.2d at 1578; *In re TC Heartland LLC*, 821 F.3d 1338, 1341 (Fed. Cir. 2016). In addition to the statutory construction arguments presented by Respondent Heartland, the reasons for the changes show that Congress intentionally made the amendments to bring the various corporate venue statutes in line.

A. Prior To 1988, The Patent Venue Statute Was More Restrictive Than General Venue Provisions

Prior to the 1988 Amendments, venue was proper in a patent action only in the district in which the defendant was an inhabitant or in any district in which the defendant had committed acts of infringement and has a regular and established place of business. *See* 28 U.S.C. § 1400(b) (1948); *see also Fourco* 353

U.S. at 225. By the mid-1960s the general venue provision also allowed a lawsuit against a corporate defendant in a jurisdiction where it is "doing business" or "where the claim arose." *See, e.g.*, 28 U.S.C. § 1391(c) (1966). While the general venue provisions were broadened over time, the patent venue provision did not change. By 1966, this Court recognized that "changes in the general venue law have left the patent venue statute far behind." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 713, n. 13. (1966).

The proposal that led to the 1988 amendments of section 1391(c) included the "for purposes of this chapter" language in the definition of corporate residence to provide a basis for that provision to be applied to venue statutes enacted in various substantive federal laws. *See* Edward H. Cooper, *Memoranda on Venue and Changes to 28 U.S.C. § 1391(c)*, 39 Pat., Trademark & Copyright J. 435, 439 (1990). The 1988 changes thus were intended to apply specifically to the venue provisions of Chapter 87 of Title 28.

B. The 2011 Legislative History Confirms A Plain Meaning Interpretation

In 2011, Congress revised the federal venue law again, but it did not return patent venue to the unduly restrictive interpretation under *Fourco*. Instead, Congress further standardized the several venue statutes by clarifying that the definition of "residency" provided in 28 U.S.C. § 1391(c) would apply "for all venue purposes." 28 U.S.C. § 1391(c) (2011).

The legislative history to the 2011 Amendments confirms Congress's intent:

> Venue Rule Applicable Universally (Proposed §1391(c)):
>
> Under section 202 of the bill, *proposed section 1391(c) would apply to all venue statutes*, including venue provisions that appear elsewhere in the United States Code.

H.R. Rep. 112-10, 20 (2011) (emphasis added).

The 2011 Amendments were enacted during the same Congress as the Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, 125 Stat. 284 *through* 125 Stat. 341 (2011). With the AIA, Congress sought to limit the perceived abuse of the district court system by non-practicing patent entities ("NPEs"), many of which frequently chose the Eastern District of Texas to litigate. For example, the AIA raised the standard for party joinder, 35 U.S.C. § 299, partly to prevent unscrupulous patent owners from inflating defendant litigation costs with joinder motions in order to demand artificially high settlements.

The AIA also created the special validity review court in the Patent Office, the Patent Trial and Appeal Board ("PTAB"), to allow patent validity to be determined more efficiently using a lower standard of review by a specialized administrative tribunal, rather than a court. *See, e.g.*, 35 U.S.C. §§ 311-329. These and other substantive changes go a long way to curtail alleged abuses of the court system by patentees.

C. Interpreting Section 1400(b) Without Applying the Definition From Section 1391(c) Would Lead To Nonsensical Results

Petitioner's proposed interpretation of section 1400(b) is inconsistent with the approach taken with respect to other special venue provisions, and risks upending all special venue provisions.

There are numerous special venue provisions throughout the U.S. Code, and these have been interpreted in a manner consistent with the general venue provisions of section 1391. For example, in antitrust cases, the courts have read section 1391 into the specific venue provisions at 15 U.S.C. § 22. *See, e.g., Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F. 2d 843, 855 (11th Cir. 1988) ("In a federal antitrust case, venue may be established under [sections 22], or the general federal venue statute, 28 U.S.C. § 1391(b)."). Interpreting the specific venue provisions of the patent laws in the same way as the specific venue provisions of the antitrust laws removes the stilted interpretation offered by Petitioner, and accords with the plain meaning of both the patent venue statute, section 1400(b), and the general venue provisions, section 1391(c).

Similarly, in 1972, the Court interpreted then section 1391(d), providing that "[a]n alien may be sued in any district," to apply to patent cases, in addition to the patent venue statute, section 1400(b). 28 U.S.C. § 1391(d); *see Brunette Mach. Works*, 406 U.S. at 714. The Court held that section 1391(d) has a "broad and overriding application" that could not be

confined to cases that otherwise fall under the general venue statute. *Id.*

Although Petitioner argues that section 1400(b) is now the sole and exclusive provision governing venue in patent infringement actions, it does not explain why subsection 1391(c)(2), the general corporate venue statute, does not apply to section 1400(b), but section 1391(c)(3), the general non-U.S. resident venue statute, does. Both fall under section 1391(c) "Residency. – ***For all venue purposes*** –." 28 U.S.C. § 1391(c) (emphasis added); ***but see Brunette Mach. Works***, 406 U.S. at 714 (interpreting section 1391(c)(3)'s predecessor). In today's global environment, it makes no sense to allow foreign corporations to evade U.S. jurisdiction and infringe U.S. patents without proper venue in the U.S. district courts for recourse.

Finally, Petitioner's argument could have a profound impact on venue in copyright cases. Section 1400(a), the copyright venue statute, provides:

> Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent ***resides or may be found***.

28 U.S.C. § 1400(a) (emphasis added). In copyright cases, many circuits hold that a corporate defendant "may be found" in any district in which it is subject to personal jurisdiction. *See, e.g., Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (affirming that "[t]he Ninth Circuit interprets this statutory provision to allow venue 'in any

judicial district in which the defendant would be amenable to personal jurisdiction if the district were a separate state.' "); *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F. 3d 441, 446 (7th Cir. 1993) (holding that "section 1400(a) itself requires that a defendant be found in particular judicial district, rather than merely in the state in which the district court sits."); *see also Time, Inc. v. Manning*, 366 F.2d 690, 695 (5th Cir. 1966) (interpreting the prior version of section 1391(c), and stating "it would indeed be anomalous to hold that a corporate defendant sufficiently present in a district to meet the residence requirements, as defined by § 1391(c), for general federal question venue is not sufficiently there to meet the less restrictive standard than § 1400(a)"); *Editorial Musical Latino Americana v. Mar Int'l. Records, Inc.*, 829 F. Supp. 62, 66 (S.D.N.Y. 1993) (holding that "[i]t is well-established that a defendant 'may be found' in any district in which he is subject to personal jurisdiction; thus venue and jurisdiction are coextensive."); *but see Nu Image, Inc. v. Does 1-23,322*, 799 F. Supp. 2d 34, 37 (D.D.C. 2011) (holding that "[w]hen copyright infringement is the sole claim being alleged, it is misleading, and arguably disingenuous to assert that venue may be proper under 1391(b), the general venue statute, when section 1400(a) is the exclusive venue statute for copyright actions.").

Interpreting "resides" in section 1400(a) in the same manner as Petitioner proposes for section 1400(b) could significantly limit the venue options for a copyright plaintiff as well as a patent plaintiff. Petitioner offers no reason why "resides" in section 1400(a) and (b) should be interpreted differently.

Many times, defendants in copyright cases are internet companies that have one place of business but that are allegedly committing copyright infringement in almost every state. *See, e.g., Am. Broadcasting Co. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). For example, online infringement actions or actions involving the distribution of infringing publications would create a challenging venue environment because neither the defendant nor its agent is "found" in a particular district. *See, e.g., Editorial Musical*, 829 F. Supp. at 64, 66. Requiring a copyright holder to chase a defendant to his one locale even though defendant committed copyright infringement in many jurisdictions does not comport with the federal venue provisions and the standardizing purpose of the 1988 and 2011 Amendments. *See, e.g.*, H.R. Rep. 112-10, 20 (interpreting the 2011 Amendments).

In sum, Petitioner's strained statutory interpretation arguments would not only flout Congressional intent with respect to patent venue, if accepted by this Court, they could have widespread unintended consequences for any area of law currently governed by a specific venue provision.

D. Petitioner's Arguments About Section 1391's Provision "Except As Otherwise Provided By Law" Run Counter To Established Balance of Powers

Petitioner incorrectly asserts that the phrase in section 1391(a), "Except as otherwise provided by law," incorporates the Supreme Court *Fourco* decision interpreting the 1948 law. Brief of Petitioner on Writ

(Pet. Brief) at 39-42. However, Petitioner's arguments run counter to long established balance of powers between the Court and Congress. *See* U.S. Const. Art. I, sec. I; and Art. III, sec. I. Congress legislates, and the Court interprets the legislation. Congress may render the Court's interpretation obsolete, either by passing a new law or by amending the old law, as it did in the 1988 Amendment to section 1391. It is of no consequence that Congress did not specify its intent to render *Fourco* obsolete when changing the structure of federal venue:

> [T]he large majority of overrides are . . . more routine *policy-updating* overrides, namely, override statutes frequently supported by bipartisan majorities in Congress that have as their stated goal the updating of public law, rather than "correction" of judicial mistakes.

Matthew R. Christiansen, William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1320 (2014). That observation makes sense when taken in context of the 1988 general venue statute amendments and the recognition that the corporate patent venue statute lagged behind other corporate venue provisions. *See, e.g., Brunette*, 406 U.S. at 713, n. 13.

Even setting aside the balance of powers principle, Petitioner's argument fails for an additional reason. The argument presupposes that, with the 2011 Amendments to section 1391, Congress sought to return the patent venue statute, section 1400(b), to its

pre-1988 form. Pet. Brief at 39-40. And, therefore, according to the Petitioner, the purpose of "Except as otherwise provided by law" was a response to the Federal Circuit's decision in *VE Holding* meant to restore the rule under *Fourco*. *Id.* at 13, 39. However, if the 1988 Amendments changed the patent venue statute, then the addition of the language in 2011, "Except as otherwise provided by law," does not incorporate the *Fourco* rule because that was not the law after 1988. Hence, the *Fourco* decision could not have been adopted by the 2011 amendments. *See Heartland*, 821 F.3d at 1342 (quoting the following from Heartland's petition for a writ of mandamus: "most special venue statutes have not been held to encompass particular rules about residency, and thus subsection (c) can apply to such statutes wherever they are found in the U.S. Code.").

II. PATENT VENUE FORUM SHOPPING RESULTED FROM MULTIPLE EVENTS

A. Local Administrative Tools

Legal scholars have theorized that competition among district courts for patent cases has created much of the forum shopping activity today. J. Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 659-60, 683 (2015).

Some district courts compete for patent infringement actions because the specialty nature of the suits brings prestige to the district. *Id.* at 663-64, 683. In addition, "[t]he court competition theory suggests that by centralizing patent appeals in the Federal Cir-

cuit—and thus unifying the law nationally—the relative importance of distinctions between district court administrative practices increased significantly." *Id.* at 635. Recognizing the potential value of these administrative practices, some district courts standardized their case management practices to attract patent litigants to their districts. *Id.*[4]

According to legal scholars, district courts may signal their interest in patent litigation in three ways:

> First, the court can codify certain practices into local procedural rules. Second, word-of-mouth can convey the court's interest to other litigants. Practitioner publications are filled with suggestions of courts that are ideal for certain types of cases. Lastly, judges and courts can explicitly announce their interest in certain types of cases.

Id. at 644.

Over thirty regional district courts have enacted separate local patent rules. *See, e.g.*, Travis Jensen, *Local Patent Rules, Patent Rules Made Easy*, LEGAL INFORMATION (2014-16), http://www.localpat-entrules.com/ (listing districts with local patent rules).

Indeed, the promulgation of the Eastern District of Texas Local Rules in 2005 further catapulted that district into the spotlight for patentees. *See* United

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[4] "Bankruptcy judges have engaged in many of the same practices that district courts have used to attract [patent] litigants." Anderson, 163 U. PA. L. REV. at 636.

States District Court for the Eastern District of Texas, Local Patent Rules, 1. Scope of Rules, http://www. txed.uscourts.gov/page1.shtml?location=rules:local. Even though the Eastern District of Texas had traditionally been a "plaintiff-friendly" civil litigation forum with a short track to trial, implementation of local patent rules in the early 21st Century that were favorable to plaintiffs telegraphed to patentees that the Eastern District was a favorable place for them to file as well. Anderson, 163 U. PA. L. REV. at 651-54.

At about the same time this phenomena was occurring in Texas, the District of New Jersey, recognizing its heavy load of pharmaceutical patent cases, and passed its own local patent rules. New Jersey District Court, Local Patent Rules (2016), http://www.njd. uscourts.gov/sites/njd/files/completelocalrules.pdf. Indeed, the "State is home to 14 of the world's 20 largest pharmaceutical companies." Pharmaceuticals, State of New Jersey Business Portal, http://www.nj.gov/njbusiness/industry/pharmaceutical/. New Jersey remains one of the main districts of choice for pharmaceutical cases. *See, e.g.*, Connell, Letchford and Cotter, 3 *Reasons NJ May Be New IP Venue of Choice*, LAW360 (2009) https://www. law360.com/articles/83629/3-reasons-nj-may-be-new-ip-venue-of-choice (discussing how the district's changes in local rules to "capitalize on the experienced judiciary in the [district], expedite discovery, and thus time to trial, and offer a unique advantage for Hatch-Waxman litigation."). Other patent heavy jurisdictions took similar actions. *See, e.g.*, Travis Jensen, *Local Patent Rules, Patent Rules Made Easy* LEGAL INFORMATION (2014-16), http://www.localpatentrules. com/.

B. The Patent Pilot Program

Returning venue determinations to the *Fourco* rule would have the effect of undermining a program which Congress devised to direct patent cases to trial judges who understand and enjoy this area of the law.

In 2011, several judicial districts were selected to participate in the Patent Pilot Program.[5] The Patent Pilot Program lasts for 10 years, or until 2021. During this time, specialized training on patent cases and case management techniques are being provided to judges in the participating district courts who request it. When a new patent case is filed in a participating district court, after an initial random assignment, if the randomly assigned judge turns the case down, the case may be reassigned to one of the specially trained judges.[6]

Some of the Patent Pilot Program district courts were selected because they were among the district courts with the highest patent filing rate. Other courts were selected because they had adopted local patent rules. Singer, *14 District Court's Selected for Patent Pilot Program*, IP SPOTLIGHT, https://ipspotlight.com/2011/06/09/14-district-courts-selected-for-patent-pilot-prgroam/ (2011). Because of their training and experience, the judges that participate in the Patent Pilot Program understand the nature and complexity of patent law, which serves both plaintiffs

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[5] Pub. L. No. 111-349, 124 Stat. 3674-3676, Jan. 4, 2011 (codified at 28 U.S.C. §137 note (2014) named six judicial districts, which eventually became 14 districts, to participate in the Patent Pilot Program.

[6] *Id.* at (a)(1).

and defendants in achieving an efficient and effective patent litigation experience.

The Petitioner's interpretation of the venue statutes impedes the intent of Congress to direct patent cases to these experienced jurists.

III. RETURN TO THE 60-YEAR OLD VENUE STANDARD OF *FOURCO* WOULD UNDLY RESTRICT PATENT LITIGATION VENUE OPTIONS

At present, no federal corporate venue statute, specific or general, is as limited as Petitioner requests the Court to rule here. While Petitioner waxes on about the damage done by forum shopping (Pet. Brief 14-16, 37-38), under a more restrictive statute, it is likely that even fewer of the trained regional district courts would regularly hear patent cases. Pickard & Kim, *The Future Of Forum-Shopping In A Post-TC Heartland World*, IP WATCHDOG (2017), http://www.ip-watchdog.com/2017/01/11/future-forum-shopping-post-tc-heartland/id=76960/.

Almost 30 years ago, the Federal Circuit in *VE Holdings* correctly determined that the plain meaning of sections 1391(c) and section 1400(b) requires interpreting "resides" in section 1400(b) consistently with "residency" in section 1391(c). This Court subsequently denied a petition for a writ of certiorari in that case. 499 U.S. 922 (1991).

While a return to *Fourco* venue limitations would reduce the number of cases that could be brought in the Eastern District of Texas, restricting patent venue to either (1) the district in which the defendant

is an inhabitant or (2) a district in which the defendant has committed acts of infringement *and* has a regular and established place of business, *Fourco*, 353 U.S. at 225, such a return could further concentrate patent litigation in certain district courts (such as Delaware and New York) that already have heavy patent dockets because many companies are incorporated there. Pickard, IP WATCHDOG (2017). In addition, many more technology cases could be concentrated in the Northern District of California because that is where the defendant may have a place of business and committed acts of infringement. *Id.* Such consolidation of patent venues—i.e., a simply shift of filings from the Eastern District of Texas to several other judicial districts—would be equally troubling to AIPLA and its members. Among other things, we would lose the benefit of the patent-trained judges of the other Patent Pilot Program districts. *See id.* In addition, such an interpretation of the applicability of "Residency" in the general venue statute section 1391(c)(1)-(3), would provide a loophole for foreign defendants and create uncertainty for copyright cases, as discussed in Section I.C. *supra*.

IV. TO THE EXTENT CHANGES TO THE PATENT VENUE STATUTE NEED TO BE MADE, CONGRESS HAS PROPOSED NUANCED SOLUTIONS THAT SHOULD BE ALLOWED TO WORK THROUGH THE LEGISLATIVE SYSTEM

For the reasons set forth above, revival of the *Fourco* interpretation of the patent venue statute would not sufficiently address concerns about patent

venue and forum shopping. Indeed, a 2007 House Report recognized that "simply returning to the 1948 venue framework would be too strict for modern patterns of technology development and global commerce." H.R. Rep. 110-314, at 40 (2007). However, some in Congress also have recognized that the current state of patent venue enforcement could be improved. H.R. Rep. 114-235, at 34 (2015) (stating that "Congress must correct" the interpretation in *VE Holding* by amending section 1400).

During the 114th Congress, both the House and the Senate introduced bills aimed at addressing the forum shopping problem: "[t]hese bills are designed, *inter alia*, to amend the federal judicial code to restrict the venues where patent actions may be brought to judicial districts where," for example, the defendant has its principal place of business or is incorporated; or the defendant has committed an act of infringement of a patent in suit *and* has a regular and established physical facility giving rise to infringement; or an inventor named on the patent conducted research or development that led to the application for the patent in suit. H.R. 9, Innovation Act, 114th Cong. § 3(g) (2015); S. 2733, Venue Equity and Non-Uniformity Elimination Act of 2016, 114th Cong. § 2(a) (2016).

In an attempt to strike a balance between the interests of patent owners who practice their patents and accused infringers, these bills considered a range of factors, including the location of the research that led to the patent and a physical facility of the defendant. *Id.* By contrast, Petitioner here asks only for a binary determination—the current interpretation of venue or that of *Fourco*.

Instead of upsetting settled patent venue law based on an incorrect statutory interpretation, this Court should allow Congress to develop a more nuanced venue policy that would harmonize current patent venue rules with the general federal venue statute and with the forum shopping concerns identified by Petitioner.

CONCLUSION

For the foregoing reasons, AIPLA respectfully requests that the Court preserve the *status quo* applicable to the current patent venue statute by affirming the decision below and leave venue reform efforts to Congress.

Respectfully submitted

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February 6, 2017